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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,

Appellants,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York and FRANK S. HOGAN, as District Attorney of New York County,

Appellees.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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Opinions Below

The Court of Appeals wrote an opinion which is appended hereto as Appendix A. The court of original jurisdiction wrote an opinion which is reported in 49 Misc. 355 and also appears in the Record on Appeal, page 18.

Jurisdiction

(i) This case arises from a judgment and an order entered in the Supreme Court of the State of New York, County of New York which granted the appellees' motions to adjudge that Sections 484-h and 484-i of the Penal Law of the State of New York are valid under the Constitution of the United States and which denied appellants' motion for judgment that those statutes are invalid and unconstitutional under the Constitution of the United States (Record, 3-5).

(ii) The judgment of the Court of Appeals was made and entered on July 7, 1966, Appendix B, *post*, page 13.

The Notice of Appeal to this court was filed on July 8, 1966 in the Supreme Court of the State of New York, County of New York, the court possessed of the record.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Section 1257(2).

(iv) The following decisions sustain the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York*, 333 U. S. 507; *Dombrowski* v. *Pfister*, 380 U. S. 479; *Evers* v. *Dwyer*, 358 U. S. 202.

Statutes Involved

The statutes, Sections 484-h and 484-i of the Penal Law of New York are set forth in Appendix C, *post*, page 14.

Question Presented

The question is, may legislation prohibit the distribution of literature to persons under an age fixed by statute.

Statement

The appellants, in a prior case, had been the subjects of a prosecution for violation of former Section 484-h of the Penal Law in that they had sold a publication to a person under 18 years of age. The publication was alleged to have been made up principally of descriptions of "illicit sex" or "sexual immorality". The Court of Appeals of New York in that prosecution held the statute to be unconstitutional for vagueness. *People* v. *The Bookcase, Inc., et al.*, 14 N. Y. 2d 409. Soon thereafter, legislation was enacted to replace the invalidated statute. The result is Sections 484-h and 484-i, here under attack. Strangely, both statutes substantially cover the same subject matter. The major difference is that Section 484-h prohibits sales to persons under 17 whereas Section 484-i forbids sales to persons under 18.

The individual appellant, Weisfeld, having been sentenced to 30 days imprisonment and the corporate appellant having been fined under the prior law and afraid of prosecution and of the threat thereof under the newly enacted laws, which are similar in substance to the invalidated one, and possessing the same and similar books involved in the previous episode, commenced this action for a judgment declaring that the statutes are unconstitutional and for an injunction against appellees, public officers, charged with enforcement of those statutes (R. 9-12). The court of original jurisdiction passed upon the validity of the statutes under the Constitution of the United States and granted judgment declaring the statutes to be valid (R. 3).

The appellants appealed to the Court of Appeals of the State of New York. That court passed upon the constitutional challenges made under the federal Constitution and affirmed the judgment it reviewed (Appendix A, *post* 12). Although the opinion does not state in so many words

that the challenge here made under the Federal Constitution, nevertheless, the implication is there. As a precaution against ambiguity, appellant has moved in the Court of Appeals for a certificate to that effect. Because of the summer recess, such a certificate will not be available until September, 1966. Accordingly, if there be any question, this appeal should be continued until then.

Thus, a judgment is in effect against the appellant, which declares the statutes to be constitutional.

The appellee, Howard R. Leary, as Commissioner was substituted by order of the Court of Appeals dated May 10, 1966 in place of his predecessor, Vincent L. Broderick.

Stage and Manner of Raising Federal Questions

The question presented here was raised in the Supreme Court of New York by appellants' complaint (R. 11), the answers of the appellees (R. 13, 14) and the respective motions for judgment (R. 7, 15, 17). The Supreme Court squarely passed upon the constitutional issue (R. 18).

The appellants appealed to the Court of Appeals directly under state procedure providing for such appeals where the constitutional validity of a statute is directly involved. That court passed upon the validity of the statutes under the Constitution of the United States (Exhibit A, *post*, p. 12).

The Question Is Substantial

Since the question has been one of considerable discussion and debate among lawyers, courts and scholars, it is hardly necessary to write at length as to its importance and substantiality.* In the only other reported case in which the question was squarely presented,—*Paramount Film Distributing Corp.* v. *City of Chicago,* 172 F. Supp. 69,—a District Court held that a classification of motion

* See for example, Lockhart and McClure, "Censorship and Obscenity: The Developing Constitutional Standards", 45 Minn. 5, 85-87.

pictures, on the age "under 21" was unconstitutional, because the age fixed was unreasonable.

Although there was a statement, made in passing, in one of the opinions in *Jacobellis* v. *Ohio*, 378 U. S. 184, reflecting upon the validity of such legislation, the question was neither involved, raised or briefed, in that case. That case therefore cannot be said to be determinative of the question here squarely and directly raised.

This court, in *Kingsley International Pictures Corp.* v. *New York*, 360 U. S. 684, held that the only publications that may be the subject of restraint by the legislature are those that are "obscene". This clearly means what it says—that all other expression is free from any restraint by the state. And in *Roth* v. *United States*, 354 U. S. 476, this Court held that obscenity, is to be determined by its effect upon the "average" person. By the statutes involved in this case, an exception is sought to be made in that the reading of literature may be regulated depending on what literature a legislature may deem harmful to a certain category of readers. These statutes are sought to be saved from condemnation by calling the literature "as obscene for children". But this is a label only, for the same literature is not assumed to be obscene for the "average man". Section 1141, New York Penal Law, is directed against obscene matter. *Mishkin* v. *New York*, 383 U. S. 502.

Does the Constitution yield when the distribution is made to a person under a certain age? If so, then the constitutional interdiction is rendered meaningless. If censorship is forbidden, how can it be approved because of the age of the reader? If the legislature may forbid certain literature to persons under a certain age, it would logically follow that the legislature may select the literature. It could then say that teaching theories of evolution to a person under 21 is unlawful, because of legislative opinion such learning may harm that person's development. To

endow a legislature with power to choose the literature it would restrain (other than the permitted one of obscenity) is to make a shambles of the concept that censorship shall not exist.

The subject divides itself into two criteria:

(1) the types of literature sought to be proscribed; and

(2) the capacity of the readership.

The necessary implications follow:

If a state may select for prohibition of certain literature because of the lack of capacity of a class of readers, it would follow that any type the legislature selects (assuming even supporting findings are made) would fall under the ban. For example, approval of this kind of censorship would mean that a state could enact legislation by which Mark Twain's "Tom Sawyer" and "Huckleberry Finn" could be banned as harmful to persons under 18 or 12 because they provide examples of school delinquency, superstition, bad manners, disrespect to elders, theft, irreverence and racism. This is not far-fetched, for it actually happened to those books. Likewise, "Peter Pan" could be ostracized for it could be shown by instances where children were tempted, in emulation, to fly out of windows, with consequent bodily injuries.

There would be no reason for confining such a regulation of readership to literature that is related to sex. Aside from the practical difficulty of trying to separate the all-pervasive sex theme, there cannot be any justification in principle or logic. If a book is a bad influence then it matters not what the nature its principle theme is.

It therefore follows that, were censorship allowed as to sex-oriented literature, not obscene to the average person, based on reader capacity, then as a matter of principle censorship should be allowed as to any other literature a

legislature may deem harmful. If this should be thought as pressing logic too hard, reference is made to a pending bill before the New York legislature (Intro. S. 444-Intro. A. 1238) in which motion pictures for children are to be categorized for licensing not only as to sex, but also to "crime", "brutality", "delinquency", "contempt of law". And see Section 484-f of the Penal Law which outlaws "comic books", proof that the fears here disclosed are real. All of which points up the conclusion that, once the door to censorship is opened even a little bit, attempts are made to widen the opening.*

Up to this point the types of literature subject to proscription have been considered. We now turn to the criterion of the capacity of the reader who is sought to be affected. The necessary implication of such a law is that the state regards it a right to intrude into the learning processes of a person. In this case, it is age that sets the standard of capacity.

There are many persons far above 18 years of age who need protection in their learning. One need not turn to "Don Quixote", of another age, to understand how an adult of 50 years was influenced by books on chivalry, resulting in anti-social behavior of assaulting persons and destroying property. The current mob spirit and the blandishments of advertising and propaganda serve to reveal that persons of all ages are affected and often badly influenced.

Justification for this type of legislation is sought by its proponents by analogy to the proscription against the sale of liquor and cigarettes to persons below a fixed age. But

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* See in this connection, *Adams* v. *Hinkle*, 51 Wash. 2d 763, 322 P. 2d 84 (1958). *Police Commissioner of Baltimore* v. *Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727 (1960); *Katzev* v. *County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310; *William Goldman Theatres, Inc.* v. *Dana*, 405 Pa. 83, 173 A. 2d 59; *In Re Louisiana News Co.*, 187 F. Supp. 241 (1960).

this court has made a solid distinction. In the *Smith* case, it was emphasized that matters of the stomach are not in the same category with publications.

Equally forceful against the validity of the statutes is the argument that such statutes restrain the distribution of literature to persons not affected by the literature. Lockhart and McClure, writing in "Censorship and Obscenity: The Developing Constitutional Standards", 45 Minn. 5, 86, conclude: "For these reasons, we suspect that the Supreme Court might well invalidate statutes designed to deny a peripheral adolescent audience access to books and magazines aimed at a primary audience of sexually mature adults, because of the tendency to reduce adult reading material to a level suitable for adolescents". The operation of such a statute by its effect produces the result, says Lockhart and McClure, against which this court spoke in *Butler* v. *Michigan*, 352 U. S. 380. This effect would be produced by compelling book-sellers to segregate such literature and guarding it against intrusion by adolescents. This advertisement against forbidden fruit could only result in attracting more adolescents. The policing problem would become an impossible burden, leading the bookseller to abandon sale even to adults. Thus, the adults would be deprived of such literature, because it was not available for distribution to adolescents. These thoughts, coming from the pen of the engineers of the so-called variable obscenity doctrine (about which more hereafter) are indeed impressive.

These statutes are directed against booksellers. The burden on a bookseller to ascertain (a) the nature of the forbidden article and (b) the age of the purchaser, can lead only to timidity on part of the bookseller, with consequent restraint upon distribution. The average bookseller, be he a newsdealer, stationery vendor or druggist, has little ability, not to mention time, to ascertain whether a given title among hundreds in his store falls within the ban of the statutes. Yet, he must be able to

not only overcome the hurdle of whether the books are obscene to the average person, but must also make a judgment whether they are obscene to children by the statutory formulas that defy lucidity for their application. And if, after wading through the complexities of both of these statutes (stopping from his duty of selling toothpaste or making a sandwich for a customer, to consult the statutes for their operation on the prospective book purchaser), he concludes that the statute applies, he then is met with the burden of guessing the age of the purchaser. And should he guess incorrectly, he is subject to a year's imprisonment. In the earlier case of *People* v. *Bookcase, Inc.* the president of the corporation, Weisfeld, received a prison sentence of 30 days because his young clerk had not acquired the wisdom of refraining from guessing a girl's age. In that case a 16 year old girl who appeared mature enough to pass for 21 was used as the bait for enforcement of the law.

How, under these circumstances can a bookseller conduct his business? He would be better off not to sell any books if these burdens and hazards are to be his lot.

This court in *Smith,* inveighed against any laws that create timidity in the distribution, for timidity impairs the free flow of ideas.

Against the appellants' arguments that these statutes create an inadmissible censorship, the principal reliance in support of this legislation is that a legislature may adopt "variable obscenity"—that is, it may stamp certain types of literature as obscene not because they are obscene by the standards of the average man, but because they may be offensive to certain persons only.

One feature of the "variable obscenity" proposal is that the material be *designed* for distribution to a susceptible audience. This requirement is probably intended to neutralize any opposition that a return to the *Hicklin* rule is in sight. In any event, the statutes in this case do not strike

against obsence literature designed for the age group. Nor is the literature in this case of that kind: "Fanny Hill", which was held by this Court ("A Book Named *'John Cleland's Memoirs of A Woman of Pleasure', et al.* v. *Attorney General of the Commonwealth of Massachusetts,* 383 U. S. 413, 16 L. ed. 2d 1) not to be obscene, is not of the kind "directed" to the age classes in both statutes.

One need not be awed by the expression, "variable obscenity". The phrase is simply part of the legerdemain so frequent in the area of First Amendment protections, where the force of a principle compels a new word to be invented for those who seek to escape the logic of the principle. *Roth* v. *United States,* 354 U. S. 476, in abandoning the *Hicklin* doctrine, held that obscenity was not to be determined by its effect upon the audience, but only by its effect upon the average man. The creators of the expression "variable obscenity" are merely reviving the *Hicklin* doctrine under a new label. The error has crept into legal literature by a misinterpretation of *Manual Enterprises* v. *Day,* 370 U. S. 478 and *United States* v. *31 Photographs,* 156 F. Supp. 350. In those cases, exception from the force of the *Roth* case was allowed, because those publications had redeeming social value. It was not the audience in those cases that was the criterion of obscenity, as the "variable" protagonists urge. Rather, concededly obscene items were found to have a social use that warranted their circulation. But that is a far cry from the instant statutes which seek to call "obscene" that which is not obscene to the average person. Were "obscenity", as defined by *Roth,* in issue, there would be no need to create a new statute; resort could be had to the existing obscenity statute, Section 1141 Penal Law. *Mishkin* v. *New York,* 383 U. S. 502, 16 L. ed. 2d 56, is an example of the enormous problems that lie ahead, though that decision rested on a *design* for a particular class.

Again, it should be noted that the statutes are not directed against literature that was specially designed for sale to

minors. The statutes merely aim at "for adults only" enforcement.

Children as well as adults should be protected from evil. This court has held that it is not the state, but the parents who have governance over the reception of ideas by children. *Meyers* v. *Nebraska*, 262 U. S. 390; *Peirce* v. *Society of Sisters of Holy Name*, 268 U. S. 510. Nothing that was said in *Prince* v. *Massachusetts*, 321 U. S. 158, subtracted from what those cases decided, for the *Prince* case was a child labor case, as a reading of it readily discloses and as the dissenting opinion explicitly emphasizes.

These statutes can only serve to harass booksellers. They cannot attain their objective of keeping an offensive book from reaching a child, for what is to prevent an older person from purchasing a book and passing it on to a younger one. While the court is not concerned with the wisdom of the law, it cannot fail to note the impact of the law on the bookseller. Will the intimidation and harassment that will ensue, be offset by any result of substantial value to society?

CONCLUSION

We believe that appellants have shown sufficiently that a serious and novel case of substance is presented, which should be reviewed by this court.

Dated, July 8, 1966.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals.

KEATING, J.:

Appellants challenge the power of the State to prohibit sales, to persons below a certain age, of literature not "obscene" within existing judicial standards for suppression of sales to the general public.

In 1963, appellant Bookcase Inc. was prosecuted for selling a book, "The Memoirs of a Woman of Pleasure" (better known as "Fanny Hill"), to a person under the age of 18 in violation of former section 484-h which prohibited sales to persons under 18 of any book "the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality * * *". Though the defendant was convicted initially, the judgment was later reversed and former section 484-h was held unconstitutional (*People* v. *Bookcase, Inc.*, 14 N Y 2d 409).

In response to the rulings of this Court in *Bookcase* (*supra*) and in *People* v. *Kahan* (15 N Y 2d 311), the Legislature in 1965 added the present section 484-h (L. 1965, ch. 327) which has the same objective but is far more detailed and applies to those under 17, and section 484-i (L. 1965, ch. 372) which is a similar provision for persons under the age of 18.

Appellants are now seeking a judgment declaring these new sections unconstitutional. Their challenge, however, is limited *solely* to the power of the state to pass such statutes. They are *not* challenging (as they did in *Bookcase, supra*) the particular statutes on grounds of vagueness, lack of proper scienter requirements, and other problem areas normally involved in a constitutional challenge to the validity of obscenity laws.*

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* Appellant in *People* v. *Tannenbaum* (17 N Y 2d ——), decided this day, did challenge section 484-i on grounds of vagueness and lack of proper scienter requirements.

Appendix A.

This Court held in *Larkin* v. *G. P. Putnam's Sons* (14 N Y 2d 399) that "Fanny Hill" was *not* obscene and could be sold to the general public, but appellants admit that the book does fall within the prohibition of sections 484-h and 484-i as regards sales to persons under 17 or 18. Appellants argue that such a distinction on the basis of age is an unconstitutional infringement upon the freedom of the press.

The decisions of the Supreme Court of the United States and of this Court have indicated that a concept of variable obscenity for the protection of children, in a properly-drawn statute, is not only within the power of our Legislature but is a desirable and even necessary provision. The statutes in question embody that concept and we uphold the validity of such a concept.

Appellants' challenge stems from the following Supreme Court statement: "Our holding in *Roth** does not recognize any state power to restrict the dissemination of books which are not obscene." (*Smith* v. *California*, 361 U. S. 147). Since, appellants argue, this Court has ruled that "Fanny Hill" is not obscene, its distribution is protected and the statutes restricting its dissemination are unconstitutional. It is worthwhile, therefore, to go back to *Roth* and trace the development in the Supreme Court of the concept of obscenity.

Roth was heard and decided together with *Alberts* v. *California*, one being a violation of a Federal obscenity statute and one a State statute. In upholding both convictions, the Supreme Court stated that obscenity was outside the constitutional protection intended for speech and the press and defined obscene material as that which deals with sex in a manner appealing to the prurient interest; that is, material having a tendency to excite lustful thoughts and utterly without redeeming social importance. The

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* *Roth* v. *United States* (354 U. S. 476).

test was said to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" (*Roth, supra,* at p. 489).

After *Smith (supra),* in which the Court shed additional light on the *Roth* tests, the Court, in *Jacobellis* v. *Ohio* (378 U. S. 184), held that under its tests for obscenity a certain film was not obscene and therefore a conviction under a state statute for exhibiting it to the general public could not be sustained. Indicative of the lack of certainty in this area was the fact that no majority opinion could be agreed upon and no less than six separate opinions and one concurrence without opinion were filed. Nevertheless, though there was disagreement on the *Roth* tests and its application to the particular film and statute in question, certain principles were gleaned, upon which a majority of the justices appeared to agree.

The opinion of Mr. Justice Brennan, who wrote for the Court in *Roth* and *Smith,* concurred in by Mr. Justice Goldberg, contained the following suggestion to the States:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does no justify a total suppression of such material, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children.' *Butler* v. *Michigan,* 352 U. S. 380, 383. State and local authorities *might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.*" (*Jacobellis,* at p. 195, emphasis added.)

Since the conviction in question was for exhibition at large and not merely to children, the judgment, according to Mr. Justice Brennan, had to be reviewed under the strict standard applicable on a national basis. The implication was that in a statute limited to "distribution of objectionable material to children", state or local interests would be determinative.

In a dissenting opinion concurred in by Mr. Justice Clark, the Chief Justice recognized that the use to which materials are put—not the words or pictures themselves—must be considered in determining obscenity. "A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." (at p. 201).

Finally, in the recent case of *Mishkin* v. *New York* (383 U. S. 502), appellant argued that the books in question did not satisfy the prurient-appeal requirement because they did not appeal to the prurient of the average person. The court rejected the argument as being an unrealistic interpretation of the requirement:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. • • • We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group • • •."

The clear implication of these cases is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dis-

semination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

The decisions of our own Court point to a similar result. In *Bookcase* we struck down the predecessor of section 484-h because it was too broad and too obscure in its coverage, but we did not challenge the power of the Legislature to provide different standards for children. (See dissenting opinion per Scileppi, J., at p. 424.)

This was spelled out more clearly in *People* v. *Kahan* (*supra*), where the *Per Curiam* opinion repeated that *Bookcase* "implied that a constitutionally valid statute defining obscenity in its impact on the young, as distinguished from obscenity in respect of adults, might emerge under careful draftsmanship." Judge Fuld added in his concurring opinion: "* * * I have no doubt that such a law, punishing the sale or distribution to children of matter deemed objectionable, under criteria that would not be permissible if applied to adults, may be drafted so as not to violate the constitutional guarantees of freedom of expression" (at p. 312).

The fact that sections 484-h and 484-i do not employ the word "obscene" itself does not mean that they are attempting to restrict constitutionally protected materials. There is no magic in the word "obscene." The Supreme Court has used it as a shorthand for those matters beyond the protection of the First Amendment and has attempted to define it. That court itself, however, has recognized not only that its success in defining "obscene" is limited

but also that by necessity such definition must be somewhat imprecise and elastic.

The fact is that the new statutes attempt to state an even more precise definition of what is beyond the First Amendment protection than does the mere shorthand term, "obscene". For example, section 484-h uses, instead of the word "obscene", a three-point definition—1) predominantly appeals to the prurient, shameful or morbid interest of minors, 2) is patently offensive to prevailing standards of what is suitable for minors, and 3) is utterly without redeeming social importance—which is virtually identical to the Supreme Court's most recent statement of the elements of obscenity. (*"Memoirs"* v. *Massachusetts,* 383 U. S. 413, ——.)

It is clear that there is no such thing as "obscenity in the air"—that is, obscene matter does not exist in a vacuum but can be found only by reference either to the group *to* whom the matter is directed or *from* whom it is barred. The Supreme Court has used as its reference point the entire adult community when dissemination was to the public at large and a particular deviant group when the materials were primarily designed and disseminated to that group. (See also *U. S.* v. *31 Photographs,* 156 F. Supp. 350 (S.D.N.Y. 1957).) When the "adult only" type of statute is tested, as here, the reference point is the community of minors.

Since, then, material is not inherently "obscene" or unprotected, but its obscenity varies with the circumstances of its dissemination, the fact that "Fanny Hill" was deemed not obscene for sale to the general public in New York should in no way preclude a determination that it is harmful to minors or "obscene" as regards the community of those below 17. This type of solution meets the problems both of protecting our young from the impact of sordid literature and at the same time protecting mature

adults from deprivation of material that is not obscene *to them.*

Appellants, however, challenge the assumption that children need *any* special care or concern. They argue that constitutional freedoms know no bounds according to age, that the mind of the child is not to be nurtured under the banner of the State, and that approval of these statutes would be a long and dangerous step toward sanctioning government control over ideas and thoughts—the censoring of literature, then religion, and then political ideologies for fear they would "harm" children.

We find it unnecessary to review the various State and Federal hearings placed before us in *Bookcase* which "amply demonstrate the damaging effect sordid pictorial and written sex literature have upon the development in children of a wholesome attitude and outlook on this very important area of life" (Dissenting opinion per Burke, J., at p. 422), but we do point out that our own Legislature has declared by law that such literature is "a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state" (Penal Law, § 484-e).

As for the charge that our Legislature will become a monstrous censor, outlawing the theory of evolution and what not, we prefer to think better of our elected representatives and see no need to act in apprehension of such censorship. While our country was founded upon, and has thrived on, the unlimited exposure to all forms of religious and political ideologies, we know of no commitment in all of our history—from the Massachusetts Bay Colony to the freedom movements of today—to the exposure of our young to all forms of lust, perversion and sadism. As the Chief Judge has written:

> "Obscenity, real, serious, not imagined or puritanically exaggerated, is today as in all the past centuries,

a public evil, a public nuisance, a public pollution. When its effective control requires censorship, I see no reason why democratic government should not use democratic processes on a high administrative level, under the control of the courts, to suppress such obscenity." Desmond, *Legal Problems in Censoring*, 40 Marquette L. Rev. 38, 56 (1956).

The Legislature, after many years of careful study, has decided that certain kinds of written matter, though suitable for adult consumption, should be kept away from children. A prior statute with that objective was ruled unconstitutional for vagueness. The challenge here to sections 484-h and 484-i does not include such grounds. We hold only that the Legislature has the constitutional power to pass such a statute. Questions of vagueness and scienter requirements must await other cases. (See *Tannenbaum, supra.*)

The judgment below should be affirmed.

* * * * *

Judgment affirmed, with costs. Opinion by Keating, J. All concur; Fuld, J., in result, except Van Voorhis, J., who dissents and votes to reverse upon the ground that jurisdiction should not be assumed to render declaratory judgment of a question of constitutionality in the abstract without ruling upon the validity of any particular statute.

APPENDIX B

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding*.

RAYMOND J. CANNON, *Clerk*.

REMITTITUR July 7, 1966.

Sup. Ct. No. 69 66

The Bookcase, Inc. & ano.,

Appellants,

vs.

Vincent L. Broderick, as Commissioner of Police of the City of New York, Frank S. Hogan, as District Attorney of New York County,

Respondents.

BE IT REMEMBERED, That on the 9th day of February in the year of our Lord one thousand nine hundred and sixty-six, The Bookcase, Inc. & ano., the appellants in this cause, came here unto the Court of Appeals by Emanuel Redfield, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the

Appendix B.

Supreme Court, New York County. And Vincent L. Broderick, as Commissioner of Police of the City of New York, Frank S. Hogan, as District Attorney of New York County, the respondent in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, Corporation Counsel, and Frank S. Hogan, District Attorney, the latter having appeared pro se.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Appendix B.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON,
Clerk.

APPENDIX C

The Statutes Involved.

§ 484-h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. Sept. 1, 1965.

§ 484-i. Sale or delivery of pornographic material to minors under the age of eighteen.

Any person who knowingly sells, lends or gives away to a person actually or apparently under the age of eighteen years:

1. Any photograph, drawing or similar representation, whether singly or in sets or contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which shows, depicts or reveals such person or persons:

(a) with less than a fully opaque covering of his or her genitals, pubic areas or buttocks, and, if that person is a female, with less than a fully opaque covering of any portion of the breast below a point immediately above the top of the areola, or

(b) with his or her genitals in a state or condition of sexual stimulation or arousal, or

(c) engaged in an act or acts of masturbation, homosexuality, or sexual intercourse, or in physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, or

2. Any collection, series or combination of photographs, drawings or similar representations, whether or not contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and depicted or shown in such a posture or way that the viewer's attention or concentration is primarily focused on that person's or those persons' genitals, pubic areas, buttock or buttocks, female breast or breasts, and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes, or

3. any book, "pocket book," pamphlet or magazine, phonograph record, tape or similar electronic reproduction of sound, containing details, descriptions, or narrative accounts of:

(a) the genitals in a state or condition of sexual stimulation or arousal, or

(b) acts of masturbation, or

(c) acts of homosexuality, or

(d) acts of sexual intercourse, or

(e) acts of physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, which contact is made in an act of sexual stimulation, gratification or perversion,

which details, descriptions or narrative accounts are written or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which are to be distinguished from flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks, shall be guilty of a misdemeanor.

For the purposes of this section, "knowingly" shall mean having knowledge of the character and content of any item described in this section, or failure to exercise reasonable inspection which would disclose the character and content of the item.

If any part or provision of this section or its application to any person or circumstances is for any reason adjudged invalid or unconstitutional by a court of competent jurisdiction, such judgment shall be limited in its effect to the facts involved in the controversy in which such judgment shall have been rendered and shall not affect the validity of the remainder of this section or its application to other persons and circumstances; and the legislature hereby declares that it would have enacted this section without the invalid part, provision or application had such invalidity been apparent. Added L.1965, c. 372, eff. July 1, 1965.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,

Appellants,

—against—

HOWARD R. LEARY, as Commissioner of Police of the City of New York and FRANK S. HOGAN, as District Attorney of New York County,

Appellees.

MOTION TO DISMISS

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Appellees.

MOTION TO DISMISS

Opinions Below

The opinion of the New York Court of Appeals was rendered on July 7, 1966 and has not as yet been reported. The opinion of the Supreme Court of the State of New York, County of New York, where this action was brought, is reported in 49 Misc 2d 355, 267 N.Y.S. 2d 415.

Statement

Penal Law, of the State of New York, sec. 484-h forbids the sale to a minor under the age of seventeen of any book, magazine, photograph, etc. that depicts or contains descriptions of nudity, sexual conduct, or

sado-masochistic abuse and which is harmful to minors. The latter nouns and the phrase "harmful to minors" are explicitly defined in subdivision 1 of the statute.

Section 484-i forbids the sale to minors under the age of eighteen of any book, magazine, etc. containing descriptions of acts of sexual activities which would appeal to the lust or curiosity of such minors, excluding medical or biological textbooks.

Violation of either statute is punishable as a misdemeanor.

The Complaint (R. 9-12)

The corporate plaintiff is a retail bookseller and the individual plaintiff is its president (Complaint, pars. "First and Second"). The gravamen of their complaint is contained in paragraphs "Thirteenth" and "Seventeenth". In the former they allege that the statutes above mentioned

> "are severally unconstitutional in violation of the Fourteenth Amendment to the Constitution of the United States in that the prohibition of the sale or dissemination of literature to a person under 18 years and 17 years of age, respectively, or under any age, is an infringement of the right of the freedom of the press". (R. 11)

In paragraph "Seventeenth" plaintiffs assert the unconstitutionality of the statutes upon the same ground but in abbreviated form:

> "The plaintiffs claim that sections 484-i and 484-h of the Penal Law severally are an invasion

of plaintiffs' constitutional rights under the Constitution of the United States as aforesaid in that the dissemination of literature may not be impaired on the basis of the age of the purchaser." (R. 11-12)

The complaint (pars. "Sixth" and "Twelfth") alleges that in *Larkin* v. *Putnam's Sons*, 14 N Y 2d 399 200 N.E. 2d 760, the Court of Appeals of the State of New York held that the book entitled "The Memoirs of a Woman of Pleasure" by John Cleland, popularly known as "Fanny Hill" is not obscene. Paragraph "Fourteenth" of the complaint alleges that this book "contains details, descriptions or narrative accounts of acts of sexual intercourse" and is "embraced within the scope and intendment of said statutes".

The appeal should be dismissed for lack of a substantial constitutional question and for lack of finality.

(1)

The theory upon which this action for a declaratory judgment was brought is that the states are without the power to forbid the sale to minors below a designated age of material which is not obscene under the *Roth* test (*Roth* v. *United States,* 354 U. S. 476 [1957]). Relying upon statements by this Court in *Roth* and in *Smith* v. *California,* 361 U. S. 147 (1959), plaintiffs say that the dissemination of only obscene matter may be constitutionally prohibited; that obscenity is the sole test of constitutionality and that unless the material is obscene its dissemination may not be banned regardless of the age of the purchaser.

In *Butler* v. *Michigan,* 352 U. S. 380, 384 (1957) this Court intimated and in *Jacobellis* v. *Ohio,* 378 U. S. 184, 195 (1964) it was held that the states may constitutionally prohibit the sale to children of matter deemed harmful to them although not obscene under the *Roth* test. This principle was also stated in *Larkin* v. *Putnam's Sons,* 14 N Y 2d 399, 417, 200 N.E. 2d 760 (1964), in *People* v. *Kahan,* 15 N Y 2d 311, 312, 206 N.E. 2d 333 (1965) and in *State* v. *Settle,* 90 R.I. 195, 156 A. 2d 921 (1959), which was cited with approval in *Jacobellis* v. *Ohio, supra.* cf. *Prince* v. *Massachusetts,* 321 U. S. 158, 165-168 (1944).

It is thus clear that the states may constitutionally enact legislation banning dissemination to children of material harmful to them under standards that could not be constitutionally applied to adults. The statutes are free of the alleged constitutional infirmity upon which the complaint is based.

(2)

Plaintiffs invoke the jurisdiction of this Court under 28 U. S. C. §1257(2), which authorizes an appeal from a final judgment or decree "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

The judgment of the New York Supreme Court does not establish the constitutional validity of the challenged statutes. As was noted by that Court (R. 20), the "sole basis for the requested constitutionality

declaration" is plaintiffs' claim that the New York Legislature has attempted to establish a ban on the dissemination of literature based on the age of the purchaser. The judgment of that Court did no more than to reject plaintiffs' limited objection to the constitutionality of the statutes.

The New York Court of Appeals, in affirming the judgment below, said (Jur. St., App. A., p. 12):

> "Appellants are now seeking a judgment declaring these [statutes] unconstitutional. Their challenge, however, is limited *solely* to the power of the state to pass such statutes. They are *not* challenging (as they did in *Bookcase, supra*) the particular statutes on grounds of vagueness, lack of proper scienter requirements, and other problem areas normally involved in a constitutional challenge to the validity of obscenity laws.*

---

* Appellant in *People* v. *Tannenbaum* (17 N Y 2d —), decided this day, did challenge section 484-i on grounds of vagueness and lack of proper scienter requirements."

(The statement in the Court's footnote that *People* v. *Tannenbaum* was decided the same day that this opinion was handed down [July 7, 1966] is incorrect. The Court has not decided *Tannenbaum* [see New York Law Journal, July 12, 1966, col. 5] and will not decide it until after the Court reconvenes in September. The opinion of the Court of Appeals as printed in Appendix A to the Jurisdictional Statement is a reproduction of an unofficial opinion issued by that Court and marked "Unrevised and Uncorrected. Not for Publication." It is anticipated that when the opinion is revised for inclusion in the official reports

the reference to the decision in *Tannenbaum* will be corrected.)

In the concluding paragraph of its opinion the Court of Appeals said (Jur. St., App. A., p. 19):

> "The Legislature, after many years of careful study, has decided that certain kinds of written matter, though suitable for adult consumption, should be kept away from children. A prior statute with that objective was ruled unconstitutional for vagueness. The challenge here to sections 484-h and 484-i does not include such grounds. *We hold only that the Legislature has the constitutional power to pass such a statute.* Questions of vagueness and scienter requirements must await other cases. (See *Tannenbaum, supra.*)" (emphasis added.)

Judge VAN VOORHIS dissented "upon the ground that jurisdiction should not be assumed to render declaratory judgment of a question of constitutionality in the abstract without ruling upon the validity of any particular statute." (*ibid.*)

It is thus clear that all the Judges of the Court of Appeals were in agreement that the Court did not adjudicate the constitutional validity of the challenged statutes. The jurisdictional basis for this appeal is, therefore, lacking for the reason that there is no decision by the highest court of the state "in favor of [the] validity" of the statutes. 28 U. S. C. §1257(2).

CONCLUSION

The motion to dismiss the appeal should be granted.

July 15, 1966.

Respectfully submitted,

J. LEE RANKIN
Corporation Counsel
Attorney for Appellee Leary

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BENJAMIN OFFNER
of Counsel

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FILED
AUG 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,
Appellants,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and FRANK S. HOGAN, as District Attorney of New York County,
Appellees,

MOTION TO DISMISS

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against

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Appellees.

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of he Supreme Court of the United States, appellees move to dismiss the appeal in the above-entitled action on the ground that it does not present a substantial federal question.

Opinion Below

On July 7, 1966, the New York Court of Appeals rendered an opinion, not yet officially reported, which is set forth in the Appendix.

Statement

This is a motion to dismiss a direct appeal from a judgment of the Court of Appeals of the State of New York which affirmed a judgment of the Supreme Court of the State of New York, New York County, declaring that Sections 484-h and 484-i of the New York Penal Law are constitutional.

In two recent decisions, *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409 (1964) and *People* v. *Kahan*, 15 N. Y. 2d 311 (1965), the Court of Appeals of the State of New York invalidated former Section 484-h of the New York Penal Law on the ground of vagueness. Subsequently the Legislature enacted the present Sections 484-h and 484-i of the New York Penal Law to fill the void left by *Bookcase* and *Kahan*. The appellants sought a declaratory judgment that the two new sections were unconstitutional, and an injunction against prosecution. Their sole contention is that any statute that seeks to prohibit the dissemination of certain literature to those below a designated age is *ipso facto* unconstitutional. The appellants moved for summary judgment. On February 4, 1966, the Supreme Court of the State of New York, New York County (Tilzer, J.) denied that motion and, granting the appellees' cross-motions, held the sections constitutional. The appellants appealed directly to the Court of Appeals of the State of New York which affirmed the judgment of the lower court, holding the sections in question to be constitutional.

Statutes Involved

§484-h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity,

sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which

contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. Sept. 1, 1965.

§484-i. Sale or delivery of pornographic material to minors under the age of eighteen.

Any person who knowingly sells, lends or gives away to a person actually or apparently under the age of eighteen years:

1. Any photograph, drawing or similar representation, whether singly or in sets or contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between

the sexes and which shows, depicts or reveals such person or persons:

(a) with less than a fully opaque covering of his or her genitals, pubic areas or buttocks, and, if that person is a female, with less than fully opaque covering of any portion of the breast below a point immediately above the top of the areola, or

(b) with his or her genitals in a state or condition of sexual stimulation or arousal, or

(c) engaged in an act or acts of masturbation, homosexuality, or sexual intercourse, or in physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, or

2. any collection, series or combination of photographs, drawings or similar representations, whether or not contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and depicted or shown in such a posture or way that the viewer's attention or concentration is primarily focused on that person's or those persons' genitals, pubic areas, buttock or buttocks, female breast or breasts, and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes, or

3. any book, "pocket book," pamphlet or magazine, phonograph record, tape or similar electronic reproduction

of sound, containing details, descriptions, or narrative accounts of:

(a) the genitals in a state or condition of sexual stimulation or arousal, or

(b) acts of masturbation, or

(c) acts of homosexuality, or

(d) acts of sexual intercourse, or

(e) acts of physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, which contact is made in an act of sexual stimulation, gratification or perversion, which details, descriptions or narrative accounts are written or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which are to be distinguished from flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks, shall be guilty of a misdemeanor.

For the purposes of this section, "knowingly" shall mean having knowledge of the character and content of any item described in this section, or failure to exercise reasonable inspection which would disclose the character and content of the item.

If any part or provision of this section or its application to any person or circumstances is for any reason adjudged invalid or unconstitutional by a court of competent jurisdiction, such judgment shall be limited in its effect to the facts in-

volved in the controversy in which such judgment shall have been rendered and shall not affect the validity of the remainder of this section or its application to other persons and circumstances; and the legislature hereby declares that it would have enacted this section without the invalid part, provision or application had such invalidity been apparent. Added L. 1965, c. 372, eff. July 1, 1965.

POINT I

The federal question is not timely or ripe for review.

Sections 484-h and 484-i of the New York Penal Law were enacted specifically to prohibit the exposure of erotic material to minors, and thus they enjoin dissemination or exhibition of certain types of books, photographs, motion pictures, and similar material to persons under certain ages [seventeen years in 484-h; eighteen years in 484-i]. And taking into consideration the peculiar susceptibility of minors to such material, the legislature included in its proscription matter which could properly be sold to adults.

Appellants have instituted an action for declaratory judgment to challenge both Sections 484-h and 484-i in general and to enjoin appellees from enforcing these two sections.

The appellants' challenge rests solely upon the premise that State Legislatures cannot enact legislation prohibiting the sale to minors of material which can be sold to adults. The attack, however, is not based upon any particular provision of the statute, nor upon any particular

factual circumstances. It is, in short, a presentation of an abstract legal issue divorced from the specific case or controversy which is required to invoke Supreme Court jurisdiction [U. S. Constitution, Article III, Section 2].

Although declaratory judgment and injunctive action have been utilized in many cases involving obscene works, these remedies are employable only where the threat of adverse legal action and the likelihood of irreparable harm is imminent. But absent the specific threat of criminal prosecution, no justiciable controversy exists [*cf. Bunis* v. *Conway,* 17 A. D. 2d 207 (4th Dept. 1962); *R & H Publishing Co.* v. *Garrett,* 151 F. Supp. 903 (N. D. Ind. 1957); *Sunshine Book Co.* v. *McCaffery,* 4 A. D. 2d 643 (1st Dept. 1957); *Kingsley Int'l Pictures Corp.* v. *Blanc,* 396 Pa. 448, 153 A. 2d 243 (1959); *In re Louisiana News Co.,* 187 F. Supp. 241 (E. D. La. 1960); *Reed Enterprises* v. *Corcoran,* —— F. 2d —— (D. C. Cir. 1965)]. And this Court has consistently refused to render advisory opinions where there is a dispute of a hypothetical or abstract nature as in the present case. *Alabama* v. *Arizona,* 291 U. S. 286 (1934).

POINT II

Sections 484-h and 484-i of the Penal Law are constitutional.

This Court has made the pointed suggestion that statutes such as the instant two might well be drawn. In *Jacobellis* v. *State of Ohio,* 378 U. S. 184 (1964), the Court said:

> "State and local authorities might well consider whether their objectives in this area would be better

served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination'' (at p. 195).

The real question presented by the instant case is whether the rights of children are as broad under the First Amendment as those of adults. Our statutes are replete with regulations excluding children from rights which all adults enjoy by virtue of the Constitution. Few would contend, and none successfully, that those of immature years have a constitutional right to vote by virtue of the Fifteenth and Nineteenth Amendments. Nor may it be said that children can bear arms free from restraints of an adult society. Children not only do not have the freedom to practice a profession, they may legally be deprived of almost all freedom for the best part of their waking day. In school, they are subjected rightfully and lawfully to restraints that for an adult would be false imprisonment. Thus, despite the vigorous protests of the children, adults arrogate the right to indoctrinate them in the discredited axioms propounded by Euclid.

In many areas, the Legislature has exercised the authority to place restrictions on the young that would be invalid for adults. The laws of New York contain numerous examples: *e.g.*, restrictions on marriage without parental consent [Dom. Rel. L. §§15, 15a], voting [Election L. §150], employment [Penal L. §485, 485-a; Labor L. §§130-140, 172, 173], driving [Veh. & Traf. L. §501 (1) (b)], admissions to certain places of entertainment [Penal L. §484], sales of liquor and tobacco [Penal L. §484(3),

484(5); Alcoholic Bev. Control L. §65] and sexual intercourse [Penal L. §2010].

The rights of children, then, are not as broad as those of adults, nor should they be. Since children are not only immature in years but in the development of their minds and emotions it is proper to protect them from the icy winds of the steep slopes of adulthood. The Legislature has undertaken the responsibility of studying the protections needed by the young. It has found that the sale of "pocket books," photographs and magazines "devoted to the presentation and exploitation of illicit sex, lust, passion, depravity, violence, brutality, nudity and immorality are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state" [Penal Law, Section 484-e]. Given the urgency of the need to protect children, the Legislature justifiably imposed sanctions on selling them certain proscribed material. It is this material, some of which may not be prohibited to adults, that is kept from children who have not yet grown into the full maturity of their constitutional rights.

Nor does the age criterion become arbitrary because the proscription occurs in a field normally within the protection of the First Amendment. As John Stuart Mill, one of the champions of free speech, wrote in 1859:

> "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by

> others must be protected against their own actions as well as against external injury" [Mill, on Liberty (Oxford Univ. Press ed.) 15; see also Chafee, Free Speech in the United States (1941), 314-315, 543].

This Court has consistently held that freedom of expression under the First Amendment is not an absolute but that there can be limited exceptions where the public interest requires [*Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, 441 (1957); *Near* v. *Minnesota,* 283 U. S. 697, 703 (1931)].

Statutes such as those challenged here are a proper and limited restriction, for by the same stroke, they impose a desirable protection of children from indecent material, and afford a broader guarantee to adults of the right to read whatever they wish. Extensive legislative hearings lay behind the enactment of the predecessor statute [1954 Report, Leg. Doc. (1954) No. 37, p. 11; 1955 Report, Leg. Doc. (1955) No. 37, pp. 10-11, 179-83; 1956 Report, Leg. Doc. (1956) No. 32, pp. 12-13; 1962 Report, Leg. Doc. (1962) No. 77; 1963 Report, Leg. Doc. (1963) No. 81]. The legislative committee found that a large and increasing number of books and magazines appealing to adolescents' prurient or perverted interests were displayed "well within the view and grasp of curious adolescents." The conclusion drawn from eleven years of patient investigation deserves recognition by the courts. Such a flood of salacious literature deprives parents of their right to guide their young in their choice of reading matter. Some prohibition on the sale of materials, therefore, is a valid exercise of the legislative prerogative to restore parental control in the interests of vulnerable youth.

At the same time, by specifically directing themselves to the distribution to minors, these statutes enhance the freedoms of adults. As long as salacious literature is sold, there will be outcries about the threatened degradation of the young. If children can be protected only by the operation of a general obscenity statute, then there will always be pressure to restrict the right to read. Such pressure tends to extend the borders of "obscenity." For example, some years ago in Detroit the assistant prosecutor, whose task it was to determine the legal status of books thought possibly obscene by the police, employed the following criterion: "If I feel I wouldn't want my 13-year-old daughter reading it, I decide it's illegal." [Wall, *Obscenity and Youth: The Problem and a Possible Solution,* 1 Criminal Law Bulletin, No. 8, p. 28, at p. 31.] Protect children by a special statute and much of that pressure will disappear.

Conclusion

We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented for the decision of this Court.

Respectfully submitted,

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New York County

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ALAN F. LEIBOWITZ
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APPENDIX A

Opinion of Court of Appeals

KEATING, J.:

Appellants challenge the power of the State to prohibit sales, to persons below a certain age, of literature not "obscene" within existing judicial standards for suppression of sales to the general public.

In 1963, appellant Bookcase Inc. was prosecuted for selling a book, "The Memoirs of a Woman of Pleasure" (better known as "Fanny Hill"), to a person under the age of 18 in violation of former section 484-h which prohibited sales to persons under 18 of any book "the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality * * *". Though the defendant was convicted initially, the judgment was later reversed and former section 484-h was held unconstitutional (*People* v. *Bookcase, Inc.*, 14 N Y 2d 409).

In response to the rulings of this Court in *Bookcase* (*supra*) and in *People* v. *Kahan* (15 N Y 2d 311), the Legislature in 1965 added the present section 484-h (L. 1965, ch. 327) which has the same objective but is far more detailed and applies to those under 17, and section 484-i (L. 1965, ch. 372) which is a similar provision for persons under the age of 18.

Appellants are now seeking a judgment declaring these new sections unconstitutional. Their challenge, however, is limited *solely* to the power of the state to pass such statutes. They are *not* challenging (as they did in *Bookcase*, *supra*) the particular statutes on grounds of vagueness, lack of

proper scienter requirements, and other problem areas normally involved in a constitutional challenge to the validity of obscenity laws.*

This Court held in *Larkin* v. *G. P. Putnam's Sons* (14 N Y 2d 399) that "Fanny Hill" was *not* obscene and could be sold to the general public, but appellants admit that the book does fall within the prohibition of sections 484-h and 484-i as regards sales to persons under 17 or 18. Appellants argue that such a distinction on the basis of age is an unconstitutional infringement upon the freedom of the press.

The decisions of the Supreme Court of the United States and of this Court have indicated that a concept of variable obscenity for the protection of children, in a properly-drawn statute, is not only within the power of our Legislature but is a desirable and even necessary provision. The statutes in question embody that concept and we uphold the validity of such a concept.

Appellants' challenge stems from the following Supreme Court statement: "Our holding in *Roth*** does not recognize any state power to restrict the dissemination of books which are not obscene." (*Smith* v. *California*, 361 U. S. 147). Since, appellants argue, this Court has ruled that "Fanny Hill" is not obscene, its distribution is protected and the statutes restricting its dissemination are uncon-

---

* Appellant in *People* v. *Tannenbaum* (17 N Y 2d ——), decided this day, did challenge section 484-i on grounds of vagueness and lack of proper scienter requirements. [This is in error, *People* v. *Tannenbaum* was not decided (J. A. K. B.).]

** *Roth* v. *United States* (354 U. S. 476).

stitutional. It is worthwhile, therefore, to go back to *Roth* and trace the development in the Supreme Court of the concept of obscenity.

Roth was heard and decided together with *Alberts* v. *California,* one being a violation of a Federal obscenity statute and one a State statute. In upholding both convictions, the Supreme Court stated that obscenity was outside the constitutional protection intended for speech and the press and defined obscene material as that which deals with sex in a manner appealing to the prurient interest; that is, material having a tendency to excite lustful thoughts and utterly without redeeming social importance. The test was said to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" (*Roth, supra,* at p. 489).

After *Smith* (*supra*), in which the Court shed additional light on the *Roth* tests, the Court, in *Jacobellis* v. *Ohio* (378 U. S. 184), held that under its tests for obscenity a certain film was not obscene and therefore a conviction under a state statute for exhibiting it to the general public could not be sustained. Indicative of the lack of certainty in this area was the fact that no majority opinion could be agreed upon and no less than six separate opinions and one concurrence without opinion were filed. Nevertheless, though there was disagreement on the *Roth* tests and its application to the particular film and statute in question, certain principles were gleaned, upon which a majority of the justices appeared to agree.

Appendix A

The opinion of Mr. Justice Brennan, who wrote for the Court in *Roth* and *Smith,* concurred in by Mr. Justice Goldberg, contained the following suggestion to the States:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children.' *Butler* v. *Michigan,* 352 U. S. 380, 383. State and local authorities *might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.*" (*Jacobellis,* at p. 195, emphasis added.)

Since the conviction in question was for exhibition at large and not merely to children, the judgment, according to Mr. Justice Brennan, had to be reviewed under the strict standard applicable on a national basis. The implication was that in a statute limited to "distribution of objectionable material to children", state or local interests would be determinative.

In a dissenting opinion concurred in by Mr. Justice Clark, the Chief Justice recognized that the use to which materials are put—not the words or pictures themselves—must be considered in determining obscenity. "A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time,

'obscene' in the extreme when sold or displayed to children." (at p. 201).

Finally, in the recent case of *Mishkin* v. *New York* (383 U. S. 502), appellant argued that the books in question did not satisfy the prurient-appeal requirement because they did not appeal to the prurient of the average person. The court rejected the argument as being an unrealistic interpretation of the requirement:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. * * * We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group * * *."

The clear implication of these cases is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

Appendix A

The decisions of our own Court point to a similar result. In *Bookcase* we struck down the predecessor of section 484-h because it was too broad and too obscure in its coverage, but we did not challenge the power of the Legislature to provide different standards for children. (See dissenting opinion per Scileppi, J., at p. 424.)

This was spelled out more clearly in *People* v. *Kahan* (*supra*), where the *Per Curiam* opinion repeated that *Bookcase* "implied that a constitutionally valid statute defining obscenity in its impact on the young, as distinguished from obscenity in respect of adults, might emerge under careful draftsmanship." Judge Fuld added in his concurring opinion: "* * * I have no doubt that such a law, punishing the sale or distribution to children of matter deemed objectionable, under criteria that would not be permissible if applied to adults, may be drafted so as not to violate the constitutional guarantees of freedom of expression" (at p. 312).

The fact that sections 484-h and 484-i do not employ the word "obscene" itself does not mean that they are attempting to restrict constitutionally protected materials. There is no magic in the word "obscene." The Supreme Court has used it as a shorthand for those matters beyond the protection of the First Amendment and has attempted to define it. That court itself, however, has recognized not only that its success in defining "obscene" is limited but also that by necessity such definition must be somewhat imprecise and elastic.

The fact is that the new statutes attempt to state an even more precise definition of what is beyond the First Amendment protection than does the mere shorthand term,

"obscene". For example, section 484-h uses, instead of the word "obscene", a three-point definition—1) predominantly appeals to the prurient, shameful or morbid interest of minors, 2) is patently offensive to prevailing standards of what is suitable for minors, and 3) is utterly without redeeming social importance—which is virtually identical to the Supreme Court's most recent statement of the elements of obscenity. (*"Memoirs"* v. *Massachusetts,* 383 U. S. 413, ——.)

It is clear that there is no such thing as "obscenity in the air"—that is, obscene matter does not exist in a vacuum but can be found only by reference either to the group *to* whom the matter is directed or *from* whom it is barred. The Supreme Court has used as its reference point the entire adult community when dissemination was to the public at large and a particular deviant group when the materials were primarily designed and disseminated to that group. (See also *U. S.* v. *31 Photographs,* 156 F. Supp. 350 (S.D.N.Y. 1957).) When the "adult only" type of statute is tested, as here, the reference point is the community of minors.

Since, then, material is not inherently "obscene" or unprotected, but its obscenity varies with the circumstances of its dissemination, the fact that "Fanny Hill" was deemed not obscene for sale to the general public in New York should in no way preclude a determination that it is harmful to minors or "obscene" as regards the community of those below 17. This type of solution meets the problems both of protecting our young from the impact of sordid literature and at the same time protecting mature

adults from deprivation of material that is not obscene *to them.*

Appellants, however, challenge the assumption that children need *any* special care or concern. They argue that constitutional freedoms know no bounds according to age, that the mind of the child is not to be nurtured under the banner of the State, and that approval of these statutes would be a long and dangerous step toward sanctioning government control over ideas and thoughts—the censoring of literature, then religion, and then political ideologies for fear they would "harm" children.

We find it unnecessary to review the various State and Federal hearings placed before us in *Bookcase* which "amply demonstrate the damaging effect sordid pictorial and written sex literature have upon the development in children of a wholesome attitude and outlook on this very important area of life" (Dissenting opinion per Burke, J., at p. 422), but we do point out that our own Legislature has declared by law that such literature is "a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state" (Penal Law, §484-e).

As for the charge that our Legislature will become a monstrous censor, outlawing the theory of evolution and what not, we prefer to think better of our elected representatives and see no need to act in apprehension of such censorship. While our country was founded upon, and has thrived on, the unlimited exposure to all forms of religious and political ideologies, we know of no commitment in all of our history—from the Massachusetts Bay Colony to the

freedom movements of today—to the exposure of our young to all forms of lust, perversion and sadism. As the Chief Judge has written:

> "Obscenity, real, serious, not imagined or puritanically exaggerated, is today as in all the past centuries, a public evil, a public nuisance, a public pollution. When its effective control requires censorship, I see no reason why democratic government should not use democratic processes on a high administrative level, under the control of the courts, to suppress such obscenity." Desmond, *Legal Problems in Censoring*, 40 Marquette L. Rev. 38, 56 (1956).

The Legislature, after many years of careful study, has decided that certain kinds of written matter, though suitable for adult consumption, should be kept away from children. A prior statute with that objective was ruled unconstitutional for vagueness. The challenge here to sections 484-h and 484-i does not include such grounds. We hold only that the Legislature has the constitutional power to pass such a statute. Questions of vagueness and scienter requirements must await other cases. (See *Tannenbaum, supra.*)

The judgment below should be affirmed.

* * * * *

Judgment affirmed, with costs. Opinion by Keating, J. All concur; Fuld, J., in result, except Van Voorhis, J., who dissents and votes to reverse upon the ground that jurisdiction should not be assumed to render declaratory judgment of a question of constitutionality in the abstract without ruling upon the validity of any particular statute.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,

Appellants,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York and FRANK S. HOGAN, as District Attorney of New York County,

Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

This brief is submitted in opposition to the motion of the appellee Leary to dismiss, and in opposition to the separate motion of the appellee Hogan.

Jurisdiction

The appellee Leary contends that the court lacks jurisdiction because "the judgment of the New York Supreme Court does not establish the constitutional validity of the challenged statutes" (a statement patently erroneous) and then is followed by the statement, "The judgment of that Court did no more than to reject plaintiffs' limited objections to the constitutionality of the statutes." This

strange and contradictory contention can only be understood if one pauses, in respect for its author, to analyze it. What appellee means, we assume, is that sometime there may be other challenges as to the constitutional validity of the statutes, and therefore, the judgment is not final.

But the appellee is mistaken. The appeal is from the final judgment of the Court of Appeals (not the New York Supreme Court). The Court of Appeals by its final judgment and opinion held that the statutes were not repugnant to the Constitution of the United States, as challenged by appellants, because a state, without offending the Constitution, may interfere with the distribution of literature based on the age of the purchaser. There is therefore before the court a final judgment of the highest court of a state sustaining the validity of a statute. That is all that 28 U.S.C. Section 1257(2) requires. *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 67. There is no requirement that a judgment to be final, must embrace and exhaust every constitutional contention that could possibly be made against a statute. If citation be necessary for such an obvious answer, the case of *Kingsley Books Inc.* v. *Brown,* 354 U. S. 436, also involving an attack on a New York statute, which was argued and decided at the same time with *Roth* v. *United States,* was expressly limited in brief and in oral argument both in this court and in the New York Court of Appeals to the question whether the statute was a prior restraint on publications. True, attacks as to the vagueness of the statute and the power of the state to censor "obscene" publications were inherent in that case, as they were in *Roth.* Appellant however chose to select and limit his range of attack. This court found no fault or lack of jurisdiction in such approach. Indeed, Section 1257(2) does not define "final" as meaning final in the sense of exhaustion of every possible question. It speaks only of a "final judgment." Life being what it is, Section 1257(2) does not demand the impossible.

This case is not an abstract one, as appellee Hogan asserts. First of all, that contention was not urged before the New York Court of Appeals and not at all involved in its decision. Indeed, at Special Term, *The Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 351, the appellee had so urged, but fruitlessly. See also, *The Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 355. That contention was abandoned by appellees in the Court of Appeals. That is why that court took jurisdiction of a direct appeal to it from a court of original jurisdiction, because there was no question involved other than the constitutional validity of a statute as required by C.P.L.R. § 5601(b)(2).

In this court, there is now a final judgment outstanding against the appellant which adjudicates that the statutes are not repugnant to the Constitution of the United States, and therefore, if the appellants were to sell the specific literature they possess, described in the complaint, to persons of a certain age, they would be subject to imprisonment for one year. This can hardly be deemed abstract. The appellants, as booksellers, are thus operating under a cloud whose chilling effect is even greater than this court observed in *Dombrowski* v. *Pfister,* 380 U. S. [redacted]. While *Dombrowski* had reason enough to be concerned about the consequences of the exercise of his First Amendment rights, these appellants have had even greater concern. Just before the enactment of the statutes they had been prosecuted, convicted, and penalized to 30 days imprisonment under a similar statute for selling the same literature to a person under 18 years of age. They were also subject to the threat of renewed prosecution, all of which is set forth in the complaint and in the opinion in the lower court in *The Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 351. They did not care to risk prosecution again with subsequent vindication of their constitutional rights. They therefore instituted this action for a declaratory judgment, as provided by New York procedure. Indeed, for the purpose of avoid-

ing First Amendment hazards, that remedy has been prescribed by New York as most efficacious, *Bunis* v. *Conway*, 17 A. D. 2d 207; *The Bookcase Inc.* v. *Broderick*, 49 Misc. 2d 351.

The Question is Substantial

The Statement as to Jurisdiction fully presents and we believe, persuasively supports the substantiality of the question raised.

The motions should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR REHEARING OF ORDER DISMISSING THE APPEAL

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PETITION FOR REHEARING OF ORDER DISMISSING THE APPEAL

This court evinced a strong interest in the undecided question presented by this appeal, as was manifest during oral argument on October 11, 1966 in *Austin* v. *Kentucky*, No. 16.

On October 10, 1966 this court, Mr. Justice BLACK and Mr. Justice WHITE dissenting, dismissed this appeal "for want of a properly presented federal question."

Reasons for Granting Rehearing

1. The decision of this court may have implied that opinion of the Court of Appeals did not show that the question was decided under the federal constitution. A supervening event therefore is involved in the disposition of this application. In the Statement as to Jurisdiction, page 4, appellants

noted that a motion to the Court of Appeals was pending to amend its judgment.

The Court of Appeals denied the motion. It stated it was unnecessary to amend its judgment to show that the federal question was presented because its opinion discloses that the federal question was passed upon.

A certified copy of the order was sent to this court on September 29, 1966. A card, dated October 10, 1966, the date of the decision of this court, was mailed by the Clerk's office acknowledging receipt of the order. It may be that the court did not have the order of the Court of Appeals before it when it made its decision. The date of the order of the Court of Appeals is September 22, 1966, a copy of which was received on September 29, 1966, the day it was sent to this court.

2. If the decision implies appellants' choice of declaratory judgment procedure was wrong, the answer is that in *DeVeau* v. *Braisted,* 363 U.S. 144, this court reviewed a judgment resulting from New York's declaratory judgment procedure, even after such procedure had been challenged below in 5 A.D. 2d 603, affirmed 5 N. Y. 2d 236. The *DeVeau* case cannot be distinguished from the present one, except that the present case is a First Amendment case and therefore has a higher rank.

To this should be noted that the appellees themselves had answered and demanded judgment in their favor that the statute is constitutional (R. 13, 14). They also moved for a declaration in their favor that the statute is constitutional (R. 15, 16). And that motion was granted in their favor (R. 3).

3. Counsel has re-examined the record in this case to discover at which point the federal question was not properly raised (e.g. *Ford Motor Co.* v. *Pace,* 364 U.S. 444). At every stage the federal constitutional question was presented: The complaint is explicit (R. 11); the motions for judgment (R. 7, 15, 17) and the decision at Special Term (R. 18). The Court of Appeals has made clear that it passed upon the federal questions raised by appellants. The conclusion is that the question was properly raised without stint at every point in the state courts.

CONCLUSION

For the reasons set forth above and in the Statement as to Jurisdiction, it is respectfully urged that a rehearing be granted, and that the court note probable jurisdiction in this case.

Respectfully submitted,

EMANUEL REDFIELD
Counsel for Appellants

I hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated: New York, New York
October 14, 1966

EMANUEL REDFIELD
Counsel for Appellants

END